

SUPER LAW GROUP, LLC

June 13, 2013

Via Certified Mail, Return Receipt Requested

RECEIVED

The Shetucket Iron & Metal Company
Stephen Seder or Edward Seder
P.O. Box 349, New Wharf
Norwich, CT 06360

JUN 24 2013

OFFICE OF THE REGIONAL ADMINISTRATOR

Re: Notice of Violation and Intent to File Suit under the Clean Water Act

Dear Mr. Seder:

We are writing on behalf of Soundkeeper, Inc.,¹ Connecticut Fund for the Environment, Inc.,² and Conservation Law Foundation, Inc.³ ("Notifiers"), to notify you of their intent to file suit against The Shetucket Iron & Metal Company ("You" or "Your") pursuant to Section 505(a) of the federal Clean Water Act ("CWA")⁴ for violations of the CWA.

The Notifiers intend to file suit, as organizations and on behalf of their adversely affected members, in the United States District Court for the District of Connecticut seeking appropriate equitable relief, civil penalties, and other relief no earlier than 60 days from the postmark date of this letter.

The Notifiers intend to take legal action because You are discharging stormwater from the scrap metal yard on New Wharf Road ("the Facility"), on the east bank of the Thames River in Norwich, to the waters of the United States without a permit in violation of Sections 301(a) and 402(p)(2)(B) of the CWA.⁵ The Facility occupies multiple parcels of land, including both 5 and

¹ Soundkeeper, Inc. is a not-for-profit 501(c)(3) organization founded in 1987 and based in Norwalk, Connecticut, whose mission is to protect and enhance the biological, physical, and chemical integrity of Long Island Sound and its watershed and tributaries through education, projects, and advocacy. Soundkeeper's members include a broad cross-section of the public, including commercial fishermen, boaters, swimmers, recreational fishers, marine industry members, shellfish harvesters, birders, and other members of the public who share Soundkeeper's mission.

² Connecticut Fund for the Environment, Inc. ("CFE") is a not-for-profit 501(c)(3) organization founded in 1978 and headquartered in New Haven, Connecticut. The mission of CFE and its permanent program, Save the Sound, is to protect and improve the land, air and water of Connecticut and Long Island Sound through legal and scientific expertise. Save the Sound and CFE represent approximately 3,600 member households, many of whom use and enjoy Long Island Sound.

³ Conservation Law Foundation, Inc. ("CLF") is a not-for-profit 501(c)(3) organization founded in 1966 and dedicated to the conservation and protection of New England's environment. Its mission includes the conservation and protection of the many uses of Connecticut's waters including those in and around the Long Island Sound watershed for, among other things, fishing, recreation, boating, scenic/aesthetic, and scientific purposes. CLF's membership includes people who live on or near the Sound and its tributaries, and use and enjoy the watershed for recreational, aesthetic, and/or scientific purposes.

⁴ 33 U.S.C. § 1365(a). We refer to statutory provisions by their section in the Clean Water Act and provide the parallel citation to the United States Code only on first reference.

⁵ 33 U.S.C. §§ 1311(a) and 1342(p)(2)(B).

7 New Wharf Road. These parcels extend more than 1,200 feet directly along the river, beginning just south of the confluence of the Shetucket and Thames rivers.

Further, You have not sought and obtained coverage under, nor complied with the conditions of, an individual National Pollutant Discharge Elimination System ("NPDES") permit or the General Permit for the Discharge of Stormwater Associated with Industrial Activity ("General Permit")⁶ issued by the Connecticut Department of Energy and Environmental Protection ("DEEP"), in violation of CWA Sections 402(p)(3)(A) and (p)(4)(A), and 40 C.F.R. §§ 122.26(c)(1) and (e)(1).

I.

BACKGROUND

With every rainfall event, hundreds of millions of gallons of polluted rainwater pour into Long Island Sound and other receiving waters. The consensus among agencies and water quality specialists is that stormwater⁷ pollution accounts for more than half of the total pollution entering the marine environment each year.

DEEP has designated more than 1000 river miles and 6000 acres of larger waterbodies in the State as "impaired," or not meeting water quality standards, and unable to support beneficial uses such as fish habitat and water contact recreation.⁸ For the overwhelming majority of water bodies listed as impaired, stormwater runoff is cited as the primary source of the pollutants causing the impairment. Contaminated stormwater discharges can and must be controlled in order to improve the quality and health of these waterbodies.

Notifiers have observed and documented evidence of the release of polluted stormwater at the Facility. In particular, as described further below, You discharge polluted stormwater from a number of point sources, including a berm that was designed to channel and convey polluted stormwater to areas where dissolved pollutants in that stormwater infiltrate into the ground and then very rapidly travel into the Thames River through the soil and through groundwater that is directly hydrologically connected to the Thames River. Further, because the berm ends short of the southern portion of the Facility, water conveyed alongside the berm can flow directly from the southern, unbermed portion of the scrap yard into the river. Thus, at points near the water's edge, polluted stormwater flows directly over the surface of the Facility into the Thames River.

⁶ State of Connecticut, Department of Energy & Environmental Protection, General Permit for the Discharge of Stormwater Associated with Industrial Activity, (hereinafter "General Permit"), *available at* http://www.ct.gov/dep/lib/dep/Permits_and_Licenses/Water_Discharge_General_Permits/storm_indust_gp.pdf (last visited [date]). Connecticut's General Permit for the Discharge of Stormwater Associated with Industrial Activity was first issued on October 1, 1992, and has been reissued and/or modified several times since then. The current General Permit became effective on October 1, 2011, and will expire on September 30, 2016.

⁷ Stormwater is water from precipitation events that flows across the ground and pavement after it rains or after snow and ice melt. *See* 40 C.F.R. § 122.26(b)(13).

⁸ *See* EPA, Watershed Assessment, Tracking and Environmental Results, http://iaspub.epa.gov/waters10/attains_index.control?p_area=CT (last visited [date]).

Other point sources at the Facility include vehicles, metal moving and compacting equipment, open containers, and piles of rusted scrap metal. You have implemented control measures that deliberately channel and convey this polluted stormwater to waters of the United States.

Stormwater discharges flow from the Facility into the Thames River, which flows south from Norwich to the Long Island Sound. DEEP has classified the Thames River as a Class “SB” water.⁹ Under the Water Quality Standards for the State of Connecticut, a waterbody that is designated as Class SB should provide habitat for marine fish and aquatic life and wildlife and support commercial shellfish harvesting, recreation, industrial water supply, and navigation.¹⁰ The Connecticut Water Quality Standards establish minimum parameters to support these designated uses, including but not limited to aesthetics, dissolved oxygen, sludge, oil and grease, scum, color, suspended and settleable solids, silt or sand deposits, turbidity, bacteria (pathogens), taste and odor, pH, temperature, chemicals, nutrients, and biological condition.¹¹

The Thames River consistently fails to meet state water quality standards and illegal stormwater discharges from this Facility contribute to this failure.¹² DEEP has designated the reach of the Thames River next to the Facility as impaired pursuant to Section 303(d) of the CWA, 33 U.S.C. § 1313(d), for failure to meet minimum water quality standards because of problematic levels of bacteria, oxygen, and nutrients in the water, and because estuarine bioassessments show a more general failure to support aquatic life.¹³ DEEP has determined that industrial point source discharges such as Yours are one cause of these impairments.¹⁴ DEEP has prioritized the development of a “Total Maximum Daily Load” (TMDL) – a pollution budget – to control bacteria in the reach of the Thames River near Norwich, but no TMDL has been established yet to address this or any other impairment.¹⁵ Thus, You contribute to an ongoing impairment by discharging metals and other pollutants that harm populations of aquatic wildlife that are already stressed, and by discharging pollutants that create chemical and biological oxygen demand into a waterbody that is impaired by low oxygen levels and that lacks a TMDL.

The Long Island Sound (“LIS”) is the ultimate receiving water for discharges from the Facility. DEEP has designated the Long Island Sound for uses including shellfishing and recreation. But the Sound consistently fails to sustain these uses and fails to meet state water quality standards. Thus, DEEP has designated LIS as impaired pursuant to Section 303(d) of the Act, 33 U.S.C. § 1313(d).¹⁶ Illegal stormwater discharges from this Facility contribute to the Sound’s impaired status.

⁹ See http://www.ct.gov/dep/cwp/view.asp?a=2719&Q=452444&depNav_GID=1654#Current

¹⁰ See *id.*; see also Connecticut Water Quality Standards at 16, http://www.ct.gov/deep/lib/deep/water/water_quality_standards/wqs_final_adopted_2_25_11.pdf (“CT WQS”)

¹¹ CT WQS at 16-17.

¹² See State of Connecticut, Dept. of Energy & Env’tl. Prot., State of Connecticut Integrated Water Quality Report, available at http://www.ct.gov/deep/lib/deep/water/water_quality_management/305b/2012_iwqr_final.pdf.

¹³ *Id.* at p.237-38.

¹⁴ *Id.*

¹⁵ *Id.* at p.334.

¹⁶ *Id.* at 296-364.

II.

STANDARDS AND LIMITATIONS ALLEGED TO HAVE BEEN VIOLATED AND ACTIVITIES ALLEGED TO BE VIOLATIONS

A. You Are Discharging Stormwater Associated with Industrial Activity to Waters of the United States without a Permit.

The CWA prohibits the discharge of pollutants to the waters of the United States except in accordance with a valid NPDES permit.¹⁷ Your industrial activity at the Facility has caused and continues to cause a “discharge of pollutants” within the meaning of Section 502(12) of the CWA¹⁸ and “stormwater discharge associated with industrial activity” within the meaning of 40 C.F.R. § 122.26(b)(14), from the Facility on at least each and every day that there has been a measurable rain event of above 0.1 inches.¹⁹ The Facility has exposed and continues to expose pollutants to stormwater, at a minimum, (a) by storing and processing scrap metal and other materials outside or otherwise exposing them to the elements, and (b) from vehicles entering and leaving the Facility that track pollutants off site. During precipitation events (including runoff from rainfall and snow or ice melt events), pollutants are discharged to waters of the United States.

Your activities at the Facility include but are not limited to the purchase, collection, processing, storage, reshipment and resale of scrap metal outdoors and the operation and storage of industrial equipment. Upon information and belief, the Facility houses scrap piles that contain industrial scrap steel, iron, and non-ferrous materials such as aluminum, copper, brass, stainless steel, bronze, zinc and various alloys that are contaminated with industrial pollutants, as well as other waste materials.

In carrying out these activities at the Facility, You store and handle materials in a manner that exposes them to precipitation and snowmelt. In particular, moving, stockpiling, processing, and crushing vehicles, metal, or other waste materials often leads to the release of pollutants including: scrap metal; paint; sediment; crushed glass; copper; lead; zinc; nickel; iron; aluminum; arsenic; cadmium; cobalt; silver; mercury; and other metals, as well as non-metal pollutants of concern and numerous other waste materials.²⁰

In addition, machinery on the site may release fuel, oil, lubricants, PCBs, PAHs, an array of metals, pH-affecting substances and chemical residue. Also, vehicles at the Facility may expose

¹⁷ 33 U.S.C. § 1311(a).

¹⁸ 33 U.S.C. § 1362(12).

¹⁹ EPA has determined that precipitation greater than 0.1 inches in a 24-hour period constitutes a measurable precipitation event for the purposes of evaluating stormwater runoff associated with industrial activity. *See, e.g.*, 40 C.F.R. § 122.26(c)(i)(E)(6) (using 0.1 inches as the distinguishing threshold of a storm event).

²⁰ *See* EPA, “Industrial Stormwater Fact Sheet Series, Sector N: Scrap Recycling and Waste Recycling Facilities,” available at <http://cfpub.epa.gov/npdes/stormwater/swsectors.cfm> (last visited Feb. 24, 2012).

many other pollutants to the elements, including gasoline, diesel fuel, anti-freeze, and hydraulic fluids.

Because You fail to adequately fence, shelter and otherwise contain these materials to prevent their release to the environment, precipitation falls on and flows over exposed materials, fluids, and particulates. Stormwater picks up sediment, oil, grease, metals, paints, plastic, solvents, nutrients, pathogens, particulates, dust and other solids that can dissolve or suspend in stormwater, and other trash and pollutants associated with the Facility's operations. Polluted stormwater is then conveyed into waters of the United States. Further, vehicles at the Facility track dust, particulate matter, and other contaminants to areas on and off the premises from which these pollutants can enter stormwater and, ultimately, waters of the United States through roadside storm drains.

You have a long history of violating the General Permit. Connecticut first required scrap metal yards to obtain General Permit coverage in 1992. You applied for permit coverage in November 1992. At that time, You discharged stormwater through designated and monitored outfalls along the river bank. Your samples revealed that You discharged some of the most highly polluted stormwater anywhere in Connecticut, consistently well in excess of allowable limits. You maintained permit coverage for ten years, through to 2002, then let it lapse. For the last ten years, You have continued to discharge stormwater associated with industrial activity without permit coverage.

Your compliance status from 1992 to 1997 is unknown, but DEEP sent You a warning letter in 1997 because Your stormwater samples showed exceedingly high levels of oil and grease, chemical oxygen demand, nitrogen, and the toxic metals copper, zinc, and lead. In 1998, DEEP sent another warning because chemical oxygen demand, copper, zinc and lead levels in Your discharge were again among the highest in the state. You violated the conditions of the General Permit yet again in 2000, with sample results exceeding DEEP's standards on 6 separate parameters, including suspended solids, nitrogen, copper, zinc, and lead levels. Most of these violations recurred again in 2001 and the discharge also failed a whole effluent toxicity test, prompting DEEP to send another letter. Your 2002 stormwater sample exceeded 4 sampling parameters: it contained more than 1,100 mg/L of suspended solids in the stormwater, which is more than ten times DEEP's current benchmark of 90 mg/L, and also contained levels of lead, copper, and zinc several times greater than DEEP's current benchmarks. Following these samples, You failed to renew permit coverage and stopped submitting sampling data to DEEP.

In June 2005, DEEP visited the Facility to inquire about Your failure to renew permit coverage and submit stormwater samples. DEEP wrote another letter to You after that visit, noting not just that You had failed to maintain permit coverage and submit samples, but also that Your pollution control practices were unacceptable: You did not properly store chemicals, waste oils and used chemical containers; industrial and automotive equipment were left in the yard uncovered and without first being drained of fluids; and employees did not promptly clean up spilled chemicals, oils, and contaminated soils. Although there are no sampling results after

2002, DEEP's 2005 letter strongly suggests that Your stormwater discharges likely have remained as polluted after they were while You had coverage.

DEEP sent You a final letter in 2008, noting that You had now failed to submit stormwater samples for five years. DEEP warned that "due to the continuing nature and significance of the violations, it is the Department's intent to pursue a more formal enforcement action."²¹ DEEP then offered You a chance to enter into a consent order that would lead to a cleanup of the Facility.

Stephen F. Seder responded to DEEP in a letter dated April 3, 2008, where he explained that "it has not been my intent to not comply."²² Mr. Seder explained that You constructed a berm along the water's edge. Thereafter, Mr. Seder determined that You "no longer had a measurable stormwater discharge" to the Thames River because stormwater held back by the berm now puddled on the property, infiltrating into the ground rather than running directly into the harbor. Mr. Seder also stated that he had previously informed a DEEP representative about construction of the new berm, and the DEEP representative had instructed You to "monitor the situation and notify [DEEP] of any change."²³ Apparently, after receiving this letter from Mr. Seder, DEEP did not pursue the matter further. There is no record of an enforcement action or consent order that would have led to a cleanup of the Facility.

Notwithstanding DEEP's decision to drop its inquiry into Your unpermitted stormwater discharges and Your failure to maintain permit coverage, the fact is that You have continued to violate the Clean Water Act. In June 2012, DEEP visited Your Facility again. At that time, DEEP found that the berm along the water's edge of Your Facility does not extend all the way to the end of the land that You use, rather, it ends short of the southern portion of the Facility, a parcel of land that You lease from another person. Water conveyed alongside the berm and through other point sources can flow directly from the southern, unbermed portion of the scrap yard into the river.

Also, during that visit, Mr. Seder explained to the DEEP inspector that polluted stormwater runoff from the Facility flows south and infiltrates into the ground. This channeling of stormwater via the berm and other point sources to an area of infiltration only yards from the river is in itself a sufficient basis to require You to obtain permit coverage.

The federal courts hold that "[t]he Clean Water Act extends federal jurisdiction over groundwater that is hydrologically connected to surface waters that are themselves waters of the

²¹ Letter from Kim Hudak, Assistant Director, Water Permitting and Enforcement Division, CT DEEP to Stephen Seder, Shetucket Iron & Metal, regarding "General Permit for the Discharge of Stormwater Associated With Industrial Activities ('Stormwater General Permit') Permit No. GSI000427" dated March 17, 2008.

²² Letter from Stephen Seder to Donna Seresin, Engineer, Water Permitting and Enforcement Division, CT DEEP, dated April 3, 2008.

²³ *Id.*

United States.”²⁴ The position of the courts is entirely in line with the U.S. Environmental Protection Agency, which interprets the CWA “to apply to discharges of pollutants from a point source via ground water that has a direct hydrologic connection to surface water” and, thus, “collected or channeled pollutants conveyed to surface water via groundwater can constitute a discharge subject to the Clean Water Act.”²⁵

The groundwater below the Facility is unquestionably connected to the adjacent Thames River. Therefore, point source discharges into the ground underneath the Facility are subject to CWA jurisdiction. By using a berm to block off the previous flow of polluted stormwater into the river, You channel it instead to low points on the property, where it puddles and infiltrates into groundwater just feet from the Thames River and then is conveyed through soil and groundwater into the Thames River. In short, You never stopped discharging stormwater associated with industrial activities to the Thames River. You simply redirected the flow of stormwater pollution from one conduit to another.

There is ample evidence that Your long-standing and inadequate waste management practices leave a host of pollutants exposed to rain, including metals such as copper, zinc, and lead. These toxic metals can dissolve in stormwater. Microscopic particles of these metals become suspended in stormwater and continue to travel with that water through soil pore spaces and out into the Thames River. Additionally, even if some metals and other pollutants adsorb onto soils, part of this pollution will subsequently leach back into the groundwater as well, forming a plume that reaches the Thames River.

You do not have NPDES permit coverage for the point source discharges of pollutants described above. Thus, You are discharging polluted industrial stormwater without the permit required under Sections 301 and 402 of the CWA.

²⁴ *Hernandez v. Esso Standard Oil Co.*, 599 F. Supp. 2d 175, 181 (D. Puerto Rico, 2009) (reviewing and collecting federal cases); *see also Dague v. City of Burlington*, 935 F.2d 1343, 1354-55 (2d Cir. 1991), *rev'd in part on other grounds* (award of attorney's fees), 505 U.S. 557; *New York v. United States*, 620 F. Supp. 374, 381 (E.D.N.Y. 1985) (a citizen suit may be brought where a discharge to groundwater threatens to contaminate navigable waters); *Mutual Life Ins. Co. of New York v. Mobil Corp.*, No. 96-CV-1781, 1998 U.S. Dist. LEXIS 4513, at *6-*7 (N.D.N.Y.) (Mar. 31, 1998) (upholding a complaint against groundwater discharge as a valid Clean Water Act claim and noting that “several district courts have held that the CWA does encompass ground waters that are hydrologically connected to regulated surface waters.”); *cf. Waterkeeper Alliance, Inc. v. U.S. E.P.A.*, 399 F.3d 486, 514 fn.26 (2d Cir. 2005) (In a Clean Water Act rulemaking, EPA did not intend to suggest that permitting authorities lacked authority to regulate discharges to groundwater that is hydrologically connected to surface on a case-by-case basis, where necessary).

²⁵ National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations, 66 Fed. Reg. 2960, 3017 (Jan. 12, 2001).

B. You are Violating the Clean Water Act by Failing to Apply for NPDES Permit Coverage.

You are engaged in the business of purchasing, collecting, storing, processing, reselling and shipping scrap metal. These activities are categorized under primary Standard Industrial Classification (“SIC”) Code 5093. Pursuant to Section 402(p) of the CWA and regulations promulgated by EPA pursuant to the CWA, as an entity conducting activities in this SIC code You must apply for coverage under the General Permit or an individual NPDES permit for Your discharge of polluted stormwater. In addition, You must apply for an individual NPDES permit if the Facility is discharging process wastewater, or has any other non-stormwater discharge containing pollutants that is not authorized by the General Permit. By failing to apply for coverage under the General Permit or an individual permit, You are violating CWA Sections 301(a) and 402(a) and (p) and 40 C.F.R. §§ 122.26(c)(1) and (e)(1).²⁶

To be eligible to discharge under the General Permit, You must submit a registration form to DEEP.²⁷ Notice of Intent forms are available online from DEEP. To register, You are required to include a brief description of all stormwater discharges, including descriptions of: the conveyances, outfalls or channelized flows that run off the site; the property and amount of impervious surfaces in square feet or acres; and the name of the watershed and nearest waterbody to which the site discharges and its Water Quality Classification.²⁸

You have failed to prepare and file a registration form or an application for an individual permit.²⁹

²⁶ Sections 301(a) and 402(a) and (p) make it unlawful for You to discharge stormwater associated with industrial activity without obtaining a NPDES permit. 40 C.F.R. Sections 122.26(c)(1) and (e)(1) require You to apply for a NPDES permit that covers Your discharge of stormwater associated with industrial activity.

²⁷ See General Permit, Section 4. In notifying You that the Clean Water Act requires coverage under and compliance with a valid NPDES permit in order to lawfully discharge, and that submission of a registration form to DEEP is required in order to obtain coverage under the General Permit, Notifiers do not concede that all of the activities conducted at the Facility are necessarily eligible for coverage under that permit. For example, if the Facility is discharging process wastewater, such as wash water, or has any other polluted non-stormwater discharge that is not authorized by the General Permit, then an individual NPDES permit is required and the failure to obtain and comply with an individual NPDES permit for such discharges also violates CWA §§ 301(a) and 402(p). The conditions for eligibility to discharge under the General Permit are listed in the permit.

²⁸ See General Permit, Section 4(c)(2)(F).

²⁹ A thorough search of EPA’s Enforcement & Compliance History Online (“ECHO”) database and DEEP’s records reveals that no registration form has been submitted for the Facility.

C. You are Violating the Clean Water Act by Failing to Comply with the General Permit.

As a discharger of stormwater associated with industrial activity, You must comply at all times with the requirements of the General Permit (or an individual permit).³⁰ By discharging stormwater associated with industrial activity without complying with the General Permit, You are violating CWA Sections 301(a) and 402(a) and (p).³¹ The main General Permit requirements that You have failed and continue to fail to meet are explained further below.

1. You have failed to develop and implement a Stormwater Pollution Prevention Plan.

Before submitting a registration form, You must prepare, make available, and implement a Stormwater Pollution Prevention Plan (“SWPPP”) in accordance with schedules established in the General Permit.³² Among other things, the SWPPP must include: a facility description, a general location map identifying the location of the facility and all receiving waters to which stormwater discharges, information related to a company stormwater pollution prevention team, a summary of potential pollutant sources, a description of control measures, and schedules and procedures for implementation of control measures, monitoring and inspections, as well as certain additional requirements specific to a scrap recycling facility.³³

You have failed to develop, make available, and implement a compliant SWPPP.³⁴

2. You have failed to implement control measures and Best Management Practices that meet the best available technology standards.

You cannot legally discharge stormwater under the General Permit until You implement mandatory general and sector-specific control measures called Best Management Practices (“BMPs”) in order to minimize the discharge of pollutants from the Facility.³⁵ The selected measures must reduce the discharge of pollution from the Facility to the extent practicable through use of the best available technology for the industry.

³⁰ This section discusses the compliance requirements of the General Permit. If You elect to seek coverage under an individual NPDES permit instead, the conditions of that individual permit will be at least as strict as those of the General Permit, thus You will still be required to comply with all of the following.

³¹ Sections 301(a) and 402(a) and (p) make it unlawful for You to discharge stormwater associated with industrial activity without first complying with all of the conditions established in a NPDES permit.

³² See General Permit, Section 5(c).

³³ See General Permit, Section 5(c)(2), and 5(f)(5)(C).

³⁴ A thorough search of DEEP’s database, *supra* note 21, reveals that as of the date of this notice, no SWPPP has not been prepared or submitted for the Facility as part of the registration for permit coverage. On information and belief, no SWPPP exists.

³⁵ See General Permit, Sections 5(b) (general BMPs) and 5(f) (includes sector-specific BMPs).

The General Permit requires that the permittee must use BMPs that will

minimize the discharge of pollutants from the permitted facility. The term “minimize” means reduce and/or eliminate to the extent achievable using control measures that are technologically available and economically practicable and achievable in light of best industry practice.³⁶

These BMPs include: minimizing exposure of stormwater to certain materials, for example by means of a permanent roof or cover;³⁷ managing stormwater runoff, for example through implementing measures such as diverting uncontaminated run-on to avoid areas that may contribute to pollutants, or through collection and reuse or treatment measures;³⁸ preventative maintenance and testing;³⁹ spill prevention and response procedures;⁴⁰ and eliminating non-stormwater discharges.⁴¹ For scrap recycling facilities, the General Permit also sets out sector-specific BMPs such as establishment of an inbound recyclable and waste material control program.⁴²

You have not implemented required control measures or BMPs that are technologically achievable and economically practicable and achievable in light of best industry practice.

3. You have failed to conduct routine site inspections and comply with monitoring, recordkeeping, and reporting requirements.

You must conduct routine comprehensive inspections of areas where industrial materials or activities are exposed to precipitation and must ensure that all stormwater control measures comply with the SWPPP.⁴³ There are two different kinds of inspections required by the General Permit. At least twice a year, qualified personnel must visually inspect material handling areas and other potential sources of pollution, and prepare a report summarizing the details and results of the inspection.⁴⁴ In addition, You must also ensure that qualified personnel conduct monthly visual inspections of equipment and specific sensitive areas of the site.⁴⁵ The schedule of these inspections as well as the records and reports resulting from these inspections must be included in Your SWPPP.⁴⁶

³⁶ General Permit, Section 5(b).

³⁷ See General Permit, Section 5(b)(5); see also General Permit, Section 5(c)(2)(D)(ii) (requiring an inventory of exposed materials).

³⁸ See General Permit, Section 5(b)(7).

³⁹ See General Permit, Section 5(b)(8).

⁴⁰ See General Permit, Section 5(b)(9).

⁴¹ See General Permit, Section 5(b)(11).

⁴² See General Permit, Section 5(f)(5)(B).

⁴³ See General Permit, Section 5(d).

⁴⁴ See General Permit, Section 5(d)(1).

⁴⁵ See General Permit, Section 5(d)(2).

⁴⁶ See General Permit, Section 5(d).

The General Permit also requires that You collect and analyze stormwater samples, conduct multiple types of analytical monitoring, document monitoring activities, and submit reports to DEEP.⁴⁷ DEEP may require additional individualized monitoring as well.⁴⁸ Further, because the Facility is a scrap recycling facility, more frequent quarterly and semi-annual monitoring is required as well as additional sector-specific benchmark monitoring.⁴⁹

Notifiers are not necessarily aware of all industrial activities taking place at the Facility. To the extent that industrial activities other than the above are carried out at the Facility, other sampling may be required as well.⁵⁰ This notice provides You with sufficient information to identify these standards and limitations.

Stormwater samples must be collected from a discharge resulting from a storm event that occurs at least 72 hours after any previous storm event generating a stormwater discharge, and must be taken during the same storm event, if feasible.⁵¹ These samples must be tested for pollution according to the methods prescribed in 40 C.F.R. part 136, unless otherwise specified in the General Permit.⁵²

For each measurement or sample taken, You must maintain records that include: the place, date, and time of sampling and the time the discharge started; the person(s) collecting the samples; the dates and times the analyses were initiated; the person(s) or laboratory that performed the analyses; the analytical techniques or methods used; and the results of all analyses.⁵³ All records and information resulting from the monitoring activities required by the General Permit, including all records of analyses performed and calibration and maintenance of instrumentation, must be retained for a minimum of five years following the expiration of the General Permit.⁵⁴

You must maintain all required monitoring data, and submit copies of certain data to DEEP in the form of reports specified in the General Permit.⁵⁵ Required monitoring data includes: stormwater monitoring reports (SMR) identifying all discharges;⁵⁶ inspection reports, summarizing the scope and description of the inspections, as well as major observations, actions taken and updates made to the SWPPP;⁵⁷ semiannual benchmark monitoring reports;⁵⁸ an Exceedance Report that must be submitted to DEEP if any of the follow-up monitoring shows

⁴⁷ See General Permit, Sections 5(e) and 5(h).

⁴⁸ See General Permit, Section 5(e).

⁴⁹ See General Permit, Section 5(f)(5)(D) and (E).

⁵⁰ See General Permit, Section 5(f).

⁵¹ See General Permit, Section 5(e)(2)(A).

⁵² See General Permit, Section 5(e)(2)(D)(i), *see also* 40 C.F.R. § 136. This does not include acute toxicity biomonitoring tests, as stated in General Permit, Section 5(e)(2)(D)(ii).

⁵³ See General Permit, Section 5(h)(1)(A).

⁵⁴ See General Permit, Section 5(h)(2).

⁵⁵ See General Permit, Section 5(h)(3).

⁵⁶ See General Permit, Section 5(e)(2)(A).

⁵⁷ See General Permit, Section 5(d)(1)(B).

⁵⁸ See General Permit, Section 5(e)(1)(B)(v).

any exceedance of a numeric effluent limit;⁵⁹ and any other required reports under the General Permit. Additionally, You have a duty to correct and report any violations immediately upon learning of such a violation.⁶⁰

You have failed to conduct the required routine inspections, monitoring and testing under the General Permit, and have failed to retain records and submit the required monitoring data and reports to DEEP.

4. You have failed to meet certain additional criteria that apply because You discharge into an impaired waterbody.

The Thames River is an impaired water, as defined by the General Permit.⁶¹ The causes of impairment include low dissolved oxygen. Scrap recycling facilities frequently discharge pollutants that create oxygen demand as they biodegrade, including various hydrocarbons.⁶² You have not prevented all exposure of oxygen-demanding pollutants to stormwater. You have not documented that oxygen-demanding pollutants are not present onsite. Therefore, Notifiers allege that You discharge oxygen-demanding pollutants.

Under the General Permit, You cannot discharge any polluted stormwater that will “cause or contribute to an exceedance of the applicable Water Quality Standards in the receiving water.”⁶³ Because You have discharged and continue to discharge oxygen demanding pollutants into an oxygen-impaired water without an established TMDL, in addition to the monitoring described above You must also monitor annually for any indicator pollutants identified as contributing to the impairment and for which a standard analytical method exists.⁶⁴ Also, You must update Your SWPPP at any time if notified by DEEP that certain changes are necessary because of the impaired status of the receiving waters, or because a TMDL has been developed for Your receiving waters.⁶⁵

Finally, federal law requires that Your discharges of oxygen demanding substances must be subject to specific, enforceable water quality based effluent limitations that will prevent Your discharge from causing or contributing to the dissolved oxygen impairment in the Thames River.⁶⁶ There is no assimilative capacity for oxygen demanding substances in the Thames

⁵⁹ See General Permit, Section 5(e)(1)(F)(ii).

⁶⁰ See General Permit, Section 6(b).

⁶¹ See General Permit, Section 2, “‘Impaired waters’ means those surface waters of the state designated by the commissioner as impaired pursuant to Section 303(d) of the Clean Water Act and as identified in the most recent State of Connecticut Integrated Water Quality Report.”

⁶² See EPA, “Industrial Stormwater Fact Sheet Series, Sector N: Scrap Recycling and Waste Recycling Facilities,” available at <http://cfpub.epa.gov/npdes/stormwater/swsectors.cfm> (last visited Feb. 24, 2012) (explaining that recycling facilities frequently discharge oil, grease, fuel, chemical residue, petroleum products, solvents, and other oxygen-demanding substances).

⁶³ General Permit, Section 5(a)(5).

⁶⁴ See General Permit, Section 5(g)(1) and Section 5(e)(1)(D).

⁶⁵ See General Permit, Section 5(c)(5).

⁶⁶ See 40 C.F.R. § 122.44(d)(1).

River. Thus, dissolved oxygen levels in Your discharge cannot exceed the dissolved oxygen water quality criteria for the Thames River.⁶⁷

You have failed to comply with the requirements applicable to a discharger to an impaired waterbody without a TMDL under Sections 5(c)(5), 5(e)(1)(D), and 5(g) of the General Permit, and the requirement of state and federal law that You not discharge pollution that causes or contributes to a violation of water quality standards.⁶⁸

5. You have failed to comply with additional requirements located in Section 5 of the Permit.

As noted above, the General Permit contains various requirements specific to a scrap recycling facility. These requirements, some of which are listed in detail above, are collected in Section 5(f) of the General Permit. You have failed to comply with the additional requirements of Section 5(f) of the General Permit.

In addition, You have failed to assure compliance with Section 5(a)(4) of the General Permit: “stormwater discharge shall not result in pollution due to acute or chronic toxicity to aquatic and marine life, impair the biological integrity of aquatic or marine ecosystems, or result in an unacceptable risk to human health.” You discharge high levels of metals, including zinc, copper, and lead, that cause acute and chronic toxicity to aquatic life. The biological integrity of the Thames River is impaired, and Your discharges contribute to this impairment.

Finally, in part 5(i) of the General Permit, Connecticut DEEP incorporated by reference certain state regulations that set forth the duties of lawful NPDES permit holders. You are also violating these obligations. These duties include:

- to comply with all terms and conditions of a NPDES permit;
- to properly operate and maintain facilities and systems for wastewater collection, storage, treatment and control;
- to use approved methods for disposal of any screenings, sludges, chemicals and oils and any solid or liquid wastes resulting from wastewater treatment;
- to maintain practices, procedures and facilities designed to prevent, minimize and control spills, leaks or such other unplanned releases of all toxic or hazardous substances and any other substances as the commissioner deems necessary to prevent pollution of the waters of the state; and
- to take all reasonable steps to minimize or prevent any discharge in violation of the permit or any discharge which has a reasonable likelihood of adversely affecting human health or the environment.⁶⁹

⁶⁷ See CT WQS at 16. The dissolved oxygen criteria are (a) 3.0 mg/L acute, and (b) chronic levels above 4.8 mg/L, with cumulative periods between 3.0-4.8 mg/L not to exceed those detailed in Appendix C of the CT WQS.

⁶⁸ See General Permit, Section 5(g)(1).

⁶⁹ See Regulations of Connecticut State Agencies §§ 22a-430-3 (e)-(h) and (p), incorporated into the General Permit in Section 5(i)(1).

In sum, Your discharge of stormwater associated with industrial activities without a permit, Your failure to apply for permit coverage, and Your failure to comply with the above-listed conditions of the General Permit (or an individual NPDES permit) constitute violations of the General Permit and of Sections 301(a) and 402(p) of the Clean Water Act.

III.

PERSONS RESPONSIBLE FOR ALLEGED VIOLATIONS

You are the person, as defined by Section 502(5) of the CWA, responsible for the violations alleged in this Notice. On information and belief, You have operated the Facility for decades and currently advertise as the operator of the Facility. You have operational control over the day-to-day industrial activities at this Facility. Therefore, You are responsible for managing stormwater at the Facility in compliance with the CWA. Notifiers hereby put You on notice that if Notifiers subsequently identify additional persons as also being responsible for the violations set forth above, Notifiers intend to include those persons in this action.

IV.

LOCATION OF THE ALLEGED VIOLATION

The violations alleged in this Notice have occurred and continue to occur at the Facility located along New Wharf Road, in Norwich, Connecticut, between the east bank of the Thames River and the railroad tracks. The failure to develop and implement pollution prevention plans and take the other required measures are violations occurring at the Facility in general and in the inadequate documents themselves.⁷⁰

V.

DATES OF VIOLATION

Every day upon which You have failed to apply for permit coverage since You first commenced operations at the Facility and discharged polluted stormwater is a separate violation of Sections 301(a), 402(p)(3)(A) and (p)(4)(A) of the CWA and EPA's regulations implementing the CWA. These days of violation have continued consecutively since 2002, when You failed to reapply for permit coverage.

⁷⁰ The federal courts have held that a reasonably specific indication of the area where violations occurred, such as the name of the facility, is sufficient and that more precise locations need not be included in the notice. *See, e.g., Natural Resources Defense Council v. Southwest Marine, Inc.*, 945 F. Supp. 1330, 1333 (S.D. Cal. 1996), *aff'd* 236 F.3d 985, 996 (9th Cir. 2000); *City of New York v. Anglebrook Ltd. Partnership*, 891 F. Supp. 900, 908 (S.D.N.Y. 1995); *United Anglers v. Kaiser Sand & Gravel Co.*, No. C 95-2066 CW, 1995 U.S. Dist. LEXIS 22449 at *4 (N.D. Cal. Sept. 27, 1995).

Additionally, You have discharged pollution without a permit in violation of Section 301(a) of the CWA on every day since You failed to reapply for permit coverage in 2002 on which there has been a measurable precipitation event or discharge of previously accumulated precipitation (i.e., snowmelt) over 0.1 inches.

Finally, if You seek permit coverage after receiving this letter but fail to fully comply with the requirements of the General Permit (or an individual permit), each day upon which You claim coverage under a NPDES permit but fail to comply with that permit will constitute a separate day of violation with respect to each unmet condition of that permit.

You are liable for the above-described violations occurring prior to the date of this letter, and for every day after the date of this letter that these violations continue. In addition to the violations set forth above, this Notice covers all violations of the CWA evidenced by information that becomes available to Notifiers after the date of this Notice of Intent to File Suit.⁷¹

These violations are ongoing, and barring full compliance with the permitting requirements of the Clean Water Act, these violations will continue.

VI.

RELIEF REQUESTED

Notifiers will ask the court to order You to comply with the Clean Water Act, to pay penalties, and to pay Notifier's costs and legal fees.

Notifiers will seek declaratory relief and injunctive relief to prevent further violations of the Clean Water Act pursuant to CWA Sections 505(a) and (d), and such other relief as permitted by law. Notifiers will seek an order from the Court requiring You to obtain NPDES permit coverage and to correct all other identified violations through direct implementation of control measures and demonstration of full regulatory compliance.

In addition, pursuant to Section 309(d) of the CWA,⁷² each separate violation of the CWA subjects You to a penalty not to exceed \$32,500 per day for each violation which occurred between March 15, 2004 and January 12, 2009, and up to \$37,500 per day for each violation that occurred after January 12, 2009.⁷³ Notifiers will seek the full penalties allowed by law.

⁷¹ See, e.g. *Public Interest Research Grp. v. Hercules, Inc.*, 50 F.3d 1239, 1248-49 (3d Cir.1995) (a notice that adequately identifies specific violations to a potential defendant also covers repeated and related violations that the plaintiff learns of later. "For example, if a permit holder has discharged pollutant 'x' in excess of the permitted effluent limit five times in a month but the citizen has learned only of four violations, the citizen will give notice of the four violations of which the citizen then has knowledge but should be able to include the fifth violation in the suit when it is discovered.").

⁷² 33 U.S.C. § 1319(d); see also 40 C.F.R. § 19.4 (Adjustment of Civil Monetary Penalties for Inflation).

⁷³ 40 C.F.R. § 19.2.

Lastly, pursuant to Section 505(d) of the CWA, Notifiers will seek recovery of their litigation fees and costs (including reasonable attorney and expert witness fees) associated with this matter.

VII.

PERSONS GIVING NOTICE

The full name, address, and telephone number of the persons giving notice are as follows:

Soundkeeper, Inc.
Physical address: 7 Edgewater Place
Mailing address: P.O. Box 4058
Norwalk, CT 06855
(203) 854-5330
Attn.: Terry Backer

Connecticut Fund for the Environment, Inc.
142 Temple Street, Suite 305
New Haven, CT 06510
(203) 787-0646
Attn.: Roger Reynolds

Conservation Law Foundation, Inc.
15 East State St., Suite 4
Montpelier, VT 05602-3010
(802) 223-5992
Attn: Zachary K. Griefen (ext. 4011)

VIII.

IDENTIFICATION OF COUNSEL

Notifiers are represented by legal counsel in this matter. The name, address, and telephone number of Notifiers' attorneys are:

Reed Super, Esq.
Alexandra Hankovszky, Esq.
Edan Rotenberg, Esq.
Super Law Group, LLC
131 Varick Street, Suite 1033
New York, New York 10013
(212) 242-2355

Roger Reynolds, Esq.
Lauren Savidge, Esq.
Connecticut Fund for the Environment, Inc.
142 Temple Street, Suite 305
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(203) 787-0646

Christopher M. Kilian, Esq.
Zachary K. Griefen, Esq.
Conservation Law Foundation, Inc.
15 East State St., Suite 4
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(802) 223-5992

IX.

CONCLUSION

The foregoing provides more than sufficient information to permit You to identify the specific standard, limitation, or order alleged to have been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the location of the alleged violation, the date or dates of such violation, and the full name, address, and telephone number of the person giving notice.⁷⁴

Notifiers are aware of Your Facility's history of violating and failing to seek coverage under Connecticut's NPDES program, and Your long history of inadequate waste management and pollution control. And we understand that for several years You have believed – wrongly – that You no longer require General Permit coverage for Your polluted stormwater discharges.

You are now on notice that You have been operating illegally and that You must seek permit coverage immediately. The law is clear. And whatever the site conditions or the understanding of DEEP's authority conveyed to You by a "DEEP representative" at some point between 2002 and 2008 – and whether or not any of these conditions may have changed since then – DEEP's opinion is not determinative and does not displace the federal court's role in determining CWA jurisdiction and liability.⁷⁵ Although Notifiers are amenable to a speedy, negotiated resolution of

⁷⁴ 40 C.F.R. § 135.3(a).

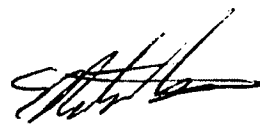
⁷⁵ See, e.g., *San Francisco Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 706 (9th Cir. 2007) ("[A] court may, in entertaining a citizen suit, decide whether a discharge of particular matter into navigable waters violates the CWA even though the regulating agency determined that the discharge was not subject to the requirement of a permit."); *Ass'n to Protect Hammersley v. Taylor Res.*, 299 F.3d 1007, 1012-1013 (9th Cir. 2002) (holding that the fact that Washington Department of Ecology "decided that an NPDES permit is not needed ... does not divest the federal courts of jurisdiction" because "neither the text of the Act nor its legislative history expressly grants to the EPA or such a state agency the exclusive authority to decide whether the release of a substance into the waters of the United States violates the Clean Water Act"); *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co. Inc.*, 73 F.3d 546, 566-67 (5th Cir. 1996) (holding that "a citizen may bring an action against a person allegedly discharging a pollutant

Your non-compliance, we intend to enforce the Clean Water Act and ensure that Your discharge of pollution to the Thames River is brought under control.

If You have developed a SWPPP, Notifiers request that You send a copy to the undersigned attorney.⁷⁶ Otherwise, Notifiers encourage You to begin developing a SWPPP immediately after receiving this letter and ask that You please inform the undersigned attorney of Your efforts so that Notifiers can work with You to avoid disputes over the contents of the SWPPP.⁷⁷

During the sixty-day notice period, Notifiers are willing to discuss effective remedies for the violations noted in this letter that may avoid the necessity of protracted litigation. If You wish to pursue such discussions, please contact the undersigned attorney immediately so that negotiations may be completed before the end of the sixty-day notice period. We do not intend to delay the filing of a complaint in federal court, regardless of whether discussions are continuing at the conclusion of the sixty days.

Very truly yours,



Edan Rotenberg, Esq.
Super Law Group, LLC
131 Varick Street, Suite 1033
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(212) 242-2355

without a permit, even if the discharger's illegal behavior results from EPA's failure or refusal to issue the necessary permit"). *See also United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 979 (2d Cir. 1984) ("The public is provided the right to seek vigorous enforcement action under the citizen suits provisions' should state and federal agencies fail to exercise their enforcement responsibility.") (quoting CWA legislative history).

⁷⁶ Note that under Part III.D.2 of the General Permit, the owner or operator of a facility "must make a copy of the SWPPP available to the public within 14 days of receipt of a written request."

⁷⁷ Notifiers will not send a new notice letter in response to any effort You make to come into compliance with the Clean Water Act after receiving this letter, for example, by developing a SWPPP. The federal courts have held that citizens sending a notice letter are not required to identify inadequacies in compliance documents that do not yet exist and are "not required to send a second notice letter in order to pursue specific claims regarding the inadequacies of [a defendant's] post-notice compliance efforts." *WaterKeepers N. Cal. v. AG Indus. Mfg.*, 375 F.3d 913, 920 (9th Cir. 2004). *See also Natural Resources Defense Council v. Southwest Marine, Inc.*, 236 F.3d 985, 997 (9th Cir. 2000) ("subject matter jurisdiction is established by providing a notice that is adequate on the date it is given to the defendant. The defendant's later changes . . . do not retroactively divest a district court of jurisdiction under 33 U.S.C. § 1365(b)."); *City of New York v. Anglebrook L.P.*, 891 F. Supp. 900, 908 (S.D.N.Y. 1995) (plaintiff's notice letter based on inadequacies of defendant's original SWPPP held sufficient to establish court's jurisdiction, even though defendant later prepared a revised SWPPP).

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cc:

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